

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

January 12, 2009 Session

WALTER WIGGINS, JR. v. DAL-TILE CORPORATION

**Direct Appeal from the Chancery Court for Madison County
No. 63436 James F. Butler, Chancellor**

No. W2008-01466-SC-WCM-WC - Mailed March 26, 2009; Filed May 28, 2009

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. Employee sought benefits for a right shoulder injury, which occurred after he had ceased working for Employer. He contended that his employment had caused a weakening of the structures of his shoulder, which contributed to his eventual injury. The trial court ruled that he did not sustain his burden of proof and entered judgment for Employer. On appeal, Employee asserts that the trial court erred in its ruling. We affirm the judgment.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the
Chancery Court Affirmed**

TONY A. CHILDRESS, SP. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and D. J. ALISSANDRATOS, SP. J., joined.

Jeffrey P. Boyd, Jackson, Tennessee, for the appellant, Walter Wiggins, Jr.

Byron K. Lindbergh, Nashville, Tennessee, for the appellee, Dal-Tile Corporation.

MEMORANDUM OPINION

Factual and Procedural Background

Walter Wiggins, Jr., (“Employee”) worked as a maintenance mechanic for Dal-Tile (“Employer”), a manufacturer of ceramic tile. He alleges that he sustained an injury to his right shoulder as a result of his employment.

In March 2001, Employee felt a popping sensation in his right shoulder while pushing a hopper full of clay. He immediately reported the incident to his supervisor, and his supervisor took him to Dr. Kenneth Warren. Dr. Warren’s initial diagnosis was that Employee had a pinched nerve in his neck. Dr. Warren, who prescribed medication to treat the condition, treated Employee thereafter until March 27, 2001. At that time, Employee’s symptoms had improved, and Dr. Warren released Employee to full duty.

In May 2001, Employee returned to Dr. Warren with similar symptoms in his left shoulder and arm. Dr. Warren, who reached the same diagnosis as before, prescribed additional conservative treatment for Employee’s symptoms. Dr. Warren also ordered an MRI, which came back as negative for any abnormality in the cervical spine. An EMG study was also ordered, which revealed a “low grade left C6 radiculopathy.” Employee’s symptoms improved, and Dr. Warren released him to full duty. Dr. Warren’s records do not contain any reference to symptoms on the right side during this period.

In November 2002, Employee again had symptoms of numbness and tingling in his left arm. Employee returned to see Dr. Warren, and Dr. Warren again prescribed conservative treatment. Dr. Warren released Employee on November 19. Dr. Warren’s records do not contain any reference to symptoms on the right side during this period. Dr. Warren, who testified by deposition, stated that Employee’s symptoms during the time he treated him were consistent with a cervical spine problem. Dr. Warren also stated that neither his examination nor Employee’s symptoms at the time suggested an injury to the right shoulder.

In November of 2002, Employee sought treatment from Williams & Williams Chiropractic Clinic. The records of that clinic indicate that Employee complained of pain in his left arm. There is no reference to any symptoms of the right shoulder or arm in those records.

Although Employee continued to work at his regular job for Employer until July 2004, Employee testified that he continued to have pain in his right shoulder throughout this period of time. Employee left his employment as a result of a dispute which arose in early 2004. This dispute arose when Employee's supervisor requested that Employee check a "dust collector" on the outside of the building. This task required Employee to climb approximately three stories (presumably by ladder; as this fact is not made clear in the record). Employee, who thought that this would be unsafe because of his hip and shoulder problems, refused the assignment. Ultimately, Employee was transferred to a different job with a lower rate of pay. Employee was not satisfied with this outcome, and he resigned his employment in July 2004.

In April 2005, Employee felt a popping sensation and pain in his right shoulder while lifting a carpet cleaning machine into his truck. He consulted Dr. G. Bradford Wright, an orthopaedic surgeon, and Dr. Wright ordered an MRI scan of the shoulder. This MRI revealed a rotator cuff tear and bone spurs, and Dr. Wright performed a corrective surgery in July 2005. Although the surgery was initially successful, Employee eventually developed an accumulation of scar tissue in his shoulder, and this accumulation of scar tissue resulted in a condition known as a "frozen shoulder." Dr. Wright recommended a procedure to treat this condition, but Employee declined to undergo the procedure.

Dr. Wright, who testified by deposition, opined that the rotator cuff tear had occurred at the time of the April 2005 lifting incident and that the bone spurs in the shoulder had developed gradually over a period of years. Dr. Wright stated that Employee's work and other activities would have contributed to the development of the bone spurs. Dr. Wright also was of the opinion that the bone spurs pressed against the tendons in the rotator cuff, which in turn weakened the rotator cuff. Dr. Wright agreed that Employee had limited range of motion of his right arm due to the frozen shoulder. Dr. Wright also said that there was not enough evidence in the medical records to determine if Employee had symptoms of a rotator cuff tear in 2001. Dr. Wright gave a couple of reasons why the medical records may not have contained such evidence. One reason was because Dr. Warren focused on Employee's neurological symptoms, and the other reason given was that the medications Dr. Warren prescribed to treat Employee could have masked some symptoms of a rotator cuff tear. Dr. Wright assigned a 12% anatomical impairment to the body as a whole due to the injury.

Dr. Apurva Dalal, an orthopaedic surgeon, conducted an IME at the request of Employee's attorney, and Employee submitted a C-32 containing Dr. Dalal's opinions. In that document, Dr. Dalal indicated that Employee's injury was related to his employment. Dr. Dalal was also of the opinion that Employee had an impairment of 16% to the body as a whole as a result of that injury. As permitted by Tenn. Code Ann. section 50-6-235(c)(1), Employer exercised its right to conduct a cross-examination deposition of Dr. Dalal.

Dr. Dalal testified that Employee had not disclosed the April 2005 incident to him. Dr. Dalal also testified that he was unaware that Employee had stopped working for Employer in July 2004. After being provided with that information, Dr. Dalal stated:

[I]t does appear that [Employee] had a problem with his AC joint, which Dr. Wright has attributed to chronic use of his arm or repeatedly in time progressively the shoulder had gotten worse.

He did sustain an injury in 2001. We do not have any documentation that I am aware of right now between 2002 and 2005. In 2005, he does give a history of another episode of injury for which he sought (sic) treatment with Dr. Wright, so it's hard for me to speculate exactly, but what I could say with reasonable medical certainty is that he did have some problem with his shoulder prior to 2005. That's all I can say.

On the date of the trial, Employee, who was a high school graduate and attended college for one and one-half years, was fifty-nine years old. He had served in the military, working as a diesel mechanic, and he had worked for Employer from 1972 until his resignation in 2004. Employee had not worked since that time, and he testified that he had limited use of his right arm because of the lack of range of motion resulting from his frozen shoulder.

The trial court found that Employee had failed to sustain his burden of proof on the issue of causation, and a judgment was entered for Employer. The court made an alternative finding that Employee had sustained a permanent partial disability of 64% to the body as a whole. Employee has appealed, and on appeal he argues that the trial court erred in finding that he did not sustain his burden of proof regarding causation. Employee also contends that the trial court erred in considering a C-32

medical report of Dr. C. R. Dyer. Employer has raised additional issues, which we find unnecessary to consider in light of our disposition of the issues raised by Employee.

Standard of Review

Review of decisions in workers' compensation cases is governed by Tenn. Code Ann. section 50-6-225(e)(2) (2008), which provides that appellate courts must "[r]eview . . . the trial court's findings of fact . . . de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." As has been observed many times, reviewing courts must conduct an in-depth examination of the trial court's factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). When the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be afforded the trial court's findings based upon documentary evidence such as depositions. *Glisson v. Mohon Int'l, Inc./Campbell Ray*, 185 S.W.3d 348, 353 (Tenn. 2006). Similarly, reviewing courts afford no presumption of correctness to a trial court's conclusions of law. *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

Analysis

1. Causation

Employee concedes that the actual rotator cuff tear occurred in 2005, nine months after his employment with employer had ended. It is the Employee's theory, however, that Dr. Warren did not make a correct diagnosis of his 2001 injury. According to Employee, the alleged incorrect diagnosis "defrauded [him] from attempting to secure the appropriate medical care and benefits that he was entitled to as a result of this injury." Proceeding from that premise, Employee argues that his work for Employer caused the gradual development of bone spurs in his shoulder and that these bone spurs in turn contributed to the 2005 rotator cuff injury.

The record does not contain any evidence to support the proposition that Dr. Warren's diagnosis was incorrect. Dr. Warren testified that Employee did not have symptoms of a right shoulder injury in 2001, and the treatment he recommended, according to his testimony and records, resolved Employee's problems. There is no

evidence of any sort that Employee sought treatment for, or even complained of, right shoulder symptoms between the end of March 2001 and April 2005. Dr. Wright's statement, quoted in part above, suggests that there was a possibility that a rotator cuff tear could have occurred in 2001, but that there was not enough evidence in Employee's medical records to determine if one had occurred.

While the record does provide a limited basis for Employee's assertion that his work activities may have contributed to the gradual formation of bone spurs in his right shoulder, that evidence is unpersuasive. Dr. Dalal testified only that Employee had "some problem" in his shoulder before 2005. Dr. Wright described the growth of the spurs as "an attritional process due to aging and the person's activities, whether those are recreational or home activities or work activities . . . that accrue over time." He also testified that the extent to which Employee's work activities contributed to that process was "just conjecture, really, to say one way or the other."

In a workers' compensation case, absolute certainty with respect to causation is not required, and the courts have recognized that, in many cases, expert opinions in this area contain an element of uncertainty and speculation. *Fritts v. Safety Nat'l Cas. Corp.*, 163 S.W.3d 673, 678 (Tenn. 2005). Moreover, we are obligated to resolve all reasonable doubts as to the causation of an injury and whether the injury arose out of the employment in favor of the employee. *Phillips v. A & H Constr. Co.*, 134 S.W.3d 145, 150 (Tenn. 2004). Nevertheless, the proof of the causal connection may not be speculative, conjectural, or uncertain. *Clark v. Nashville Mach. Elevator Co.*, 129 S.W. 3d 42, 47 (Tenn. 2004). In this case, it is undisputed that the injury for which Employee is seeking compensation occurred long after his employment with Employer had ended. The medical evidence of any connection between the injury and the employment is, as Dr. Wright testified, "just conjecture." Our review of the evidence leads us to the conclusion that the trial court's decision on this issue was correct.

2. Admission of C-32 of Dr. Dyer

Prior to the trial, Employer filed a notice in accordance with Tenn. Code Ann. section 50-6-235 that it intended to rely upon a C-32 medical report from Dr. C. R. Dyer, an orthopaedic surgeon. Employee filed an objection at the time, which stated that, in accordance with the statute, he would "take steps to schedule the deposition of Dr. C. Robinson Dyer for purposes of cross-examination." That document, however, did not raise any issue regarding the admissibility of the report. There is

no indication in the record, however, that Dr. Dyer's deposition was taken. Dr. Dyer, who did not examine Employee, reviewed Employee's medical files, and based on that review, he opined that Employee's injury was not work-related. On appeal, Employee argues several reasons why Dr. Dyer's opinion is not reliable. Employee's arguments also address the weight of the evidence.

The trial court mentioned Dr. Dyer's report in its findings. A fair reading of the decision, however, reveals that the depositions of the other doctors were given much greater weight. Further, the record does not reveal that Employee objected when the document was introduced into evidence at trial. In any event, we conclude that the evidence preponderates in favor of the trial court's judgment, even if Dr. Dyer's report is not considered, and therefore, any alleged error in admitting or considering that evidence did not affect the trial court's judgment. Tenn. R. App. P. 36(b).

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Walter Wiggins, Jr., and his surety, for which execution may issue if necessary.

TONY A. CHILDRESS

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No. 63436**

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Walter Wiggins, Jr. pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Walter Wiggins, Jr., and his surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Cornelia A. Clark, J., not participating